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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RUBEN MITCHELL et al., Defendants and Appellants.	A150156, A150433 (Alameda County Super. Ct. Nos. C178704A, C178704B, C178704C)

A jury convicted Paul Booker, Ruben Mitchell, and Jason Beasley (collectively, defendants) of several felonies, including torture (Pen. Code, § 206)[1] and human trafficking for commercial sex (§ 236.1, subd. (b)). Defendants appeal, raising numerous claims of error.

We affirm Booker and Mitchell's judgments. We remand Beasley's case to the trial court for a recalculation of his presentence and conduct credits and amendment of the abstract of judgment. In all other respects, we affirm Beasley's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Charges

The prosecution charged defendants with eight crimes arising out of a June 2013 incident. The operative information alleged: kidnapping to commit a sex crime (§ 209, subd. (b)(1) (count 1)); assault with a firearm (§ 245, subd. (a)(2) (count 2)); torture (§ 206 (count 3)); rape by a foreign object acting in concert (§§ 264.1, subd. (a), 289,

[1] Undesignated statutory references are to the Penal Code.

subd. (a) (count 4)); assault with a deadly weapon, a hunting knife (§ 245, subd. (a)(1) (count 5)); attempted pandering by procuring (§ 266i, subd. (a)(1) (count 6)); human trafficking for commercial sex (§ 236.1, subd. (b) (count 7)); and forcible rape while acting in concert (§ 264.1, subd. (a) (count 8)). The information also alleged numerous sentencing enhancements, including that Booker used a firearm in the commission of count 3 (§ 12022.5, subd. (a)).

Trial Overview

A. Prosecution Evidence

In May 2013, Booker and Beasley were pimps in Oakland. Beasley and Mitchell were rap artists, and appeared in a music video together. 17-year-old Jane Doe was a prostitute in Oakland. Doe did not have a pimp but knew of pimps in the area, including Booker and Beasley. Booker wanted Doe to "prostitute for him" but she refused.

On June 2, 2013, Doe and Beasley "hung out" and had sex. The next day, Beasley planned to drive Doe "out of town," where she would work as a prostitute. Doe, however, changed her mind and asked Beasley to drop her off near her house. Beasley did not drop Doe off. Instead, he took her to several other locations, eventually stopping the car on an isolated road, near a corner where Booker was standing with three or four men, including Mitchell. One man saw Doe and said, " 'There goes that bitch.' " The men pointed at Doe. Then they got into a car.

Beasley drove away, but shortly thereafter, Booker's car arrived. Booker, Mitchell, and others got out of the car and approached Beasley's car. Booker had a Glock handgun. Booker and the other men dragged Doe out of Beasley's car. Doe screamed for help, but Beasley did not assist her. Doe felt Beasley had set her up because he let the men drag her out of the car.

Booker "beat [Doe] up" with his gun, striking her multiple times in the face. Doe's "head was busted" and she lost "so much blood." Booker also put his gun in Doe's mouth and told her to " '[s]hut up.' " Then he and several other men grabbed Doe by her hair and threw her in the trunk. The car stopped at Booker's apartment, and Booker dragged Doe inside.

There were "a lot of people" in the apartment, including defendants.[2] People in the apartment were "talking shit" to Doe; Mitchell and others told Doe she "should have just been a ho[]" and Mitchell screamed, " 'Why don't you just ho[.]' " Doe was thrown to the ground and hit several times. As she was beaten, the men told her: "You gotta make money for us[.]" Then Doe "blacked out." When she regained consciousness, her neck, arms, and legs were bound with duct tape. A makeshift blindfold had been placed over her head, but it came off. Booker and another man "started cutting" Doe with a machete, first on her breast, then on her back, leg, and stomach.

Booker said, " 'Bitch, you gone [*sic*] make my money' " and " 'I am going to kill you bitch if you don't make my money.' " Booker put his gun in Doe's vagina and threatened to kill her if she screamed, saying " 'My trigger finger is itching.' " Beasley watched. He did not help Doe.

Doe drifted in and out of consciousness. Her head was "busted open" and she was "losing a lot of blood." Doe's eyes were swollen shut. She awoke in a bedroom—"naked and cut up"—on top of black garbage bags. She was still duct taped, but "there was so much blood that [her] arms got loose[.]" Doe removed a window screen and jumped out of a window. Still naked, Doe made her way to a nearby driveway and hid underneath a parked car. A man saw Doe, gave her a shirt, and called the police. The man told the police that two men with guns had been looking for Doe, and identified Booker as one of the men.

About five minutes later, the police arrived and found Doe under the car. She was "terrified. She was very, very scared and kept asking [the police officer] to get her out of there." Doe begged the officer to help her and said a man was "trying to kill [her]" and

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[2] Doe told the police Mitchell was in the apartment. At trial, Doe identified a photograph of Mitchell, but she could not identify him in the courtroom because he was wearing glasses and he had changed his hairstyle. As Doe and Mitchell were being transported to court during trial, Doe identified Mitchell. She told the sheriff's deputy " 'That's the guy that did this to me. That's the guy that raped me[,]' " and the deputy confirmed it was Mitchell. At one point during her trial testimony, Doe said she thought Mitchell "was just sitting on the couch," in the apartment, but acknowledged she could not "remember all of the details" about the ordeal.

that he lived nearby. Doe's face was swollen and bleeding. She had duct tape around her neck. Doe showed the police the car used to kidnap her and the apartment where she was held. She gave the police the name "Paul," identified Booker's picture, and said he had been "seeking her to prostitute for him" and that he tried to kill her. Doe also told the police someone was "looking for her" and that "these guys had lots of guns."[3] Doe was taken to the hospital, where she gave a statement. She was "very shaken, very upset." A medical examination confirmed Doe's account of her injuries.

The car used to kidnap Doe belonged to Booker. In the apartment, police found a box containing Booker's wallet and personal documents, including his birth certificate. Police also found a roll of duct tape, black trash bags, a long-bladed knife, and Glock handgun ammunition. In a bedroom, there was blood on a window sill. The window screen was on the ground, below the window.

Latent prints were found on an inside layer of the duct tape used to secure Doe's blindfold. Seven prints "were of sufficient quality and quantity" and had "enough unique detail" to be presented to a fingerprint examiner. Some of the prints were palm prints. Kimberly Lankford, a latent print examiner, identified one of the palm prints as belonging to Mitchell. Another criminalist verified Lankford's identification.

Shortly before trial, Beasley asked Doe: "Please don't snitch on me. Don't tell on me."

B. Defense Evidence

Ralph Haber, Ph.D., testified as an expert for Mitchell regarding fingerprint identification. He stated the latent print matched to Mitchell lacked "many reliable features" and was "harder to justify . . . as a palm rather than just a piece of a fingerprint." Dr. Haber opined the "print that was lifted wasn't good enough" to make an identification. He did not analyze the print himself; he did not attempt to verify Lankford's work. Dr. Haber acknowledged the Oakland Police Department crime lab is accredited and that he had not reviewed the process the lab used to verify prints.

[3] The court admitted a recording from a police officer's body camera. When she gave the police a statement, Doe lied about various details because she was afraid.

The court admitted a 2014 booking photo of Mitchell with no face tattoo. A witness for Beasley corroborated Doe's description of the abduction and identified Mitchell as one of the armed kidnappers. The witness claimed she and Beasley went to a restaurant after Doe was abducted.

Verdict and Sentence

In September 2016, the jury convicted Booker and Mitchell of the lesser included offense of kidnapping on count 1 and counts 2, 3, 4, 5, 6, and 7. As to Booker, the jury found he personally used a firearm in the commission of count 2 (assault with a firearm), and count 3 (torture) (§ 12022.5, subd. (a)). The jury convicted Beasley of the lesser included offense of kidnapping on count 1, and counts 3, 6, and 7.

In December 2016, the court sentenced defendants. As relevant here, the court sentenced Booker to 55 years to life in state prison, comprised of 25 years to life on count 4 (rape by a foreign object acting in concert), 20 years for count 7 (human trafficking), and 10 years to life on count 3 (torture). The sentence for count 3 (torture) included a firearm enhancement (§ 12022.5, subd. (a)). The court imposed and stayed a firearm enhancement (§ 12022.5, subd. (a)) on count 2 (assault with a firearm).

The court sentenced Mitchell to 45 years to life in state prison, comprised of 25 years to life on count 4 (penetration with a foreign object acting in concert), 20 years on count 7 (human trafficking), and a life term on count 3 (torture). The court sentenced Beasley to 15 years, 8 months to life in state prison.

After defendants appealed, the trial court amended Booker and Mitchell's respective abstracts of judgment to correct minor sentencing errors. We requested and received supplemental briefs on Booker's firearm enhancements. (§ 12022.5, subd. (c).)

DISCUSSION

I.

Substantial Evidence Supports Beasley's Convictions

Beasley contends there is insufficient evidence he aided and abetted the "crimes." This argument is forfeited because Beasley has not identified the convictions supposedly lacking in evidentiary support.[4]

At oral argument, counsel for Beasley stated all of Beasley's convictions were unsupported by sufficient evidence. We reject the argument on the merits. (*People v. Abilez* (2007) 41 Cal.4th 472, 504 [rejecting insufficient evidence claim].) "[A] person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) "[A] person aids and abets the commission of a crime when he . . . , acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) " 'Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.' " (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

All of these factors are present here. Doe testified Beasley set her up to be kidnapped. He ignored Doe's request to be taken home and instead drove her to an isolated road near where Booker and Mitchell were standing. Beasley allowed Booker

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[4] On the last page of his 82-page opening brief, Beasley states he "joins in the arguments raised in Booker's and Mitchell's briefs to the extent applicable." We reject this perfunctory joinder argument because Booker and Mitchell's opening briefs total 150 pages and because defendants raise numerous claims of error from all stages of the proceedings. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363–364.) We reject Beasley's cumulative error argument for the same reason: it is unsupported by meaningful argument or analysis. (*People v. Weaver* (2001) 26 Cal.4th 876, 987.) We also reject Mitchell's cumulative error argument. (*People v. Duff* (2014) 58 Cal.4th 527, 562.)

and Mitchell to drag Doe out of the car and watched as she was thrown in the trunk of Booker's car. In Booker's apartment, Beasley declined to assist Doe as she was beaten and tortured. From this evidence, the jury could easily conclude Beasley—himself a pimp—was part of a plan to kidnap Doe, brutalize her, and force her to prostitute herself. Ample evidence supports Beasley's kidnapping conviction. (*People v. Burney* (2009) 47 Cal.4th 203, 232–233.)

Beasley's attacks on Doe's credibility do not alter our conclusion. When considering the sufficiency of the evidence "[w]e neither reweigh the evidence nor reevaluate the credibility of witnesses." (*People v. Jennings* (2010) 50 Cal.4th 616, 638.) Doe initially declined to identify Beasley as a participant, but her failure to do so is readily explained by her fear of retaliation. There was nothing inherently improbable with Doe's trial testimony—to the contrary, her description of the kidnapping was largely corroborated by Beasley's witness.

We also reject Beasley's claim that there is insufficient evidence he aided and abetted in the torture. Booker's brutal act of binding Doe with duct tape, blindfolding her, and cutting her with a machete constitute torture. " '[T]orture has two elements: (1) a person inflicted great bodily injury upon the person of another, and (2) the person inflicting the injury did so with specific intent to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose.' " (*People v. Pre* (2004) 117 Cal.App.4th 413, 419.)

Doe suffered great bodily injury. (*People v. Odom* (2016) 244 Cal.App.4th 237, 247.) Circumstantial evidence also establishes Booker possessed the intent to cause Doe " 'cruel and extreme pain and suffering for the purpose of revenge, . . . persuasion, or for any sadistic purpose.' " (*People v. Pre, supra,* 117 Cal.App.4th at p. 419.) Comments Booker made during the ordeal support an inference he intended to inflict severe pain on Doe for a sadistic purpose. (See *People v. Flores* (2016) 2 Cal.App.5th 855, 872.) Beasley does not persuasively contend otherwise. There was also sufficient evidence Beasley aided and abetted Booker's torture. Doe testified Beasley set up the kidnapping, supporting an inference that Beasley knew of Booker's sadistic purpose and intended to

assist Booker in carrying out that purpose. There is no evidence Beasley was at the kidnapping by accident, that he was unaware of Booker's criminal intent, or that he lacked knowledge Doe was being brutalized by Booker. "[T]he evidence, in our view, reasonably indicates that [Beasley] played an affirmative supportive role in the [torture] and was not simply an innocent, passive, and unwitting bystander." (*People v. Campbell, supra,* 25 Cal.App.4th at pp. 409–410; *People v. Nguyen* (2015) 61 Cal.4th 1015, 1055 [evidence supported inference the defendant knew of perpetrator's intent to kill, shared that intent, and aided the perpetrator by spotting potential targets].)

Based on the evidence recited above, we also conclude substantial evidence supports Beasley's convictions for attempted pandering by procuring (count 6) and human trafficking for commercial sex (count 7). (See *People v. Guyton* (2018) 20 Cal.App.5th 499, 506–507.)

II.

Substantial Evidence Supports Mitchell's Convictions

Mitchell challenges the sufficiency of the evidence supporting three convictions: torture (count 3), rape with a foreign object acting in concert (count 4), and assault with a deadly weapon, a knife (count 5). We conclude the record, viewed as a whole, "contains sound, credible evidence that amply supports" Mitchell's convictions as a direct perpetrator and as an aider and abettor. (*People v. Baker* (2002) 98 Cal.App.4th 1217, 1224.) Beasley's witness identified Mitchell as an armed kidnapper. Doe told the police Mitchell was at the apartment when she was tortured. At trial, Doe identified a picture of Mitchell and told a sheriff's deputy Mitchell was " 'the guy that did this to me. That's the guy that raped me.' " Mitchell's palm print was found on an inner layer of the duct tape used to bind Doe's blindfold. At the apartment, Booker and another man cut Doe with a machete. Mitchell had a relationship with Beasley, who was at the apartment.

Together, this evidence demonstrates Mitchell facilitated the kidnapping and shared Booker's intent to inflict extreme injury on Doe, and that he aided and abetted the crimes in the apartment. Mitchell's contrary view of the evidence is not persuasive. When applying the substantial evidence standard of review, we must draw all reasonable

inferences in support of the jury's finding and uphold the conviction even if there is evidence supporting a contrary finding. (*People v. Kaufman* (2017) 17 Cal.App.5th 370, 380–381.)

III.

No Improper Restriction on Expert Testimony

Mitchell challenges two rulings pertaining to his expert witness, Dr. Haber.

A. No Error in Excluding Dr. Haber from the Courtroom While Lankford Testified

Mitchell requested Dr. Haber be present when Lankford, the prosecution's fingerprint expert, testified because Dr. Haber would address Lankford's "analysis and conclusions." The prosecutor objected, arguing the jury would "determine the credibility . . . [and] quality of the investigation. It's not for someone else to sit in the courtroom and then listen or adjust their testimony to try to impede on that function of the jury." The court denied Mitchell's request.

A trial court has discretion to exclude witnesses, including experts, from the courtroom while other witnesses testify. (*People v. Roybal* (1998) 19 Cal.4th 481, 511; Evid. Code, § 777.) The purpose of this rule "is to prevent tailored testimony and aid in the detection of less than candid testimony." (*People v. Valdez* (1986) 177 Cal.App.3d 680, 687.) Here, the court did not abuse its discretion by excluding Dr. Haber from the courtroom while Lankford testified, notwithstanding Mitchell's claim that he articulated a "legitimate purpose" for authorizing Dr. Haber's presence. (*Roybal, supra,* at pp. 510–511; *Valdez,* at p. 687.) Mitchell's reliance on cases from other jurisdictions does not alter our conclusion. (See *People v. Waxler* (2014) 224 Cal.App.4th 712, 723.)

B. No Error in Restricting the Scope of Dr. Haber's Expert Testimony

Mitchell sought to qualify Dr. Haber as an expert in several areas, including rates of erroneous fingerprint identification. During voir dire, Dr. Haber acknowledged he did not analyze the fingerprints—instead he accepted Lankford's analysis. The court determined Dr. Haber was "not an expert in the area of erroneous rates. . . . He's

critiquing other people's opinions about what they've done." Dr. Haber testified the palm print attributed to Mitchell "wasn't good enough" to make a reliable identification.

Precluding Dr. Haber from offering expert testimony on erroneous fingerprint identification rates was not an abuse of discretion. The court permitted defense counsel to question Dr. Haber about error rates, and allowed him to criticize the reliability of Lankford's identification. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 128 [no abuse of discretion in restricting scope of expert testimony].) Even if the court erred, the error is harmless because it is not reasonably probable Mitchell would have achieved a more favorable result had the court qualified Dr. Haber as an expert in the area of fingerprint identification error rates.

IV.

Omission of the Intent Element in the Human Trafficking Instruction Was Harmless Beyond a Reasonable Doubt

The elements of human trafficking are "(1) the defendant either deprived another person of personal liberty or violated that other person's personal liberty; and (2) when the defendant did so, he . . . intended to obtain forced labor or services from that person." (*People v. Halim* (2017) 14 Cal.App.5th 632, 643.)

Here, the second element of the jury instruction—a modification of CALCRIM No. 1243—stated: "[w]hen the defendant acted, *the other person* intended to maintain a violation of . . . [section] 266h or 266i." (Italics added.) Defendants argue the human trafficking conviction must be reversed because the instruction did not require the jury to find *defendants* possessed the requisite intent. We conclude the error was harmless beyond a reasonable doubt because it "did not contribute to the jury's verdict." (*People v. Cole* (2004) 33 Cal.4th 1158, 1208; *Chapman v. California* (1967) 386 U.S. 18, 24.) The evidence established defendants had the present intent to force Doe to work as a prostitute: Doe testified Booker was attempting to force her to work as a prostitute and statements Booker and Mitchell made in the apartment corroborated Doe's testimony—Mitchell and others told Doe she needed to "make money for us" and Booker threatened to kill Doe if she did not "make . . . money" for him. Even with the

typographical error, a logical reading of the instruction required the jury to find *defendants* had the intent to obtain forced labor or services from Doe. The jury recognized the instruction as written was illogical; its verdict on the human trafficking charge—based on overwhelming evidence—establishes the error in the jury instruction was of no consequence.

In an effort to establish they lacked the intent to force Doe to work as a prostitute, defendants rely on Doe's testimony that about a week before the incident, Booker wanted Doe to "prostitute for him" but she refused. Defendants claim this testimony shows they "did not attempt to influence Doe's future conduct, but instead sought to exact retribution for Doe's earlier refusal to engage in prostitution." We are not persuaded this evidence would lead a rational juror to conclude defendants lacked the present intent to influence Doe to be a prostitute. Two additional factors persuade us the error in the jury instruction was harmless beyond a reasonable doubt: (1) the court instructed the jury with CALCRIM No. 252 (union of act and intent: general and specific intent together), which informed the jury that human trafficking required a finding of specific intent; and (2) the jury convicted defendants of attempted pandering, which required a finding that defendants possessed the intent to effect or maintain a violation of the pandering statute.

We conclude the instructional error was harmless beyond a reasonable doubt. (*People v. Jurado* (2006) 38 Cal.4th 72, 123 [omission of intent element in jury instruction was harmless beyond a reasonable doubt]; *People v. Sakarias* (2000) 22 Cal.4th 596, 625 [affirming notwithstanding instructional error where jury "could not have rationally found the omitted element unproven"].)

V.

No Prejudicial Error in Failing to Instruct on Misdemeanor False Imprisonment

Booker and Mitchell claim the court erred by failing to instruct the jury on false imprisonment as a lesser included offense of human trafficking. Misdemeanor false imprisonment has one element: the defendant committed an "unlawful violation of the personal liberty of another." (§ 236.) A defendant who commits human trafficking

necessarily commits misdemeanor false imprisonment because he deprives or violates the personal liberty of another, with the intent to effect or maintain a violation of the pandering statute. (§ 236.1.) We assume misdemeanor false imprisonment is a lesser included offense of human trafficking, and that the court erred by failing to instruct on that lesser included offense.

We conclude the jury's verdict on attempted pandering demonstrates the failure to instruct on false imprisonment was harmless. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.) In convicting defendants of attempted pandering, the jury made the necessary finding to elevate misdemeanor false imprisonment to human trafficking—i.e., that defendants acted with the intent to violate the pandering statute. As a result, it is not reasonably probable Booker and Mitchell would have obtained a more favorable result had the jury been instructed with the lesser included offense.

Booker and Mitchell claim they did not have the present intent to pander. This argument fails for the reasons discussed *ante*, and ignores the numerous statements Booker, Mitchell, and others made on the day of the incident establishing they held Doe against her will as a means to coerce her to prostitute herself. Booker acknowledges these statements are "some evidence of an intent to influence Doe that was contemporaneous with the . . . kidnapping" and that Doe's testimony supported a conclusion that "her captors were animated by a desire to influence her to engage in prostitution[.]"

Any assumed error in failing to instruct the jury on the lesser included offense of false imprisonment is harmless. (*People v. Beames* (2007) 40 Cal.4th 907, 928.)

VI.

The Challenge to CALCRIM No. 401 Fails

Beasley and Mitchell challenge one sentence in CALCRIM No. 401, the pattern instruction on aiding and abetting. After reciting the elements of aider and abettor liability, the instruction states: "If you conclude that defendant was present at the scene of the crime *or* failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor." (CALCRIM No. 401, italics added.)

Beasley and Mitchell contend the use of the word "or" lessened the prosecution's burden of proof because the prosecution had the burden to establish they aided *and* abetted.

This claim is forfeited because neither Beasley nor Mitchell objected to the instruction. (*People v. Fraser* (2006) 138 Cal.App.4th 1430, 1452.) The claim fails on the merits for the reasons discussed in *People v. Campbell, supra,* 25 Cal.App.4th at pages 411 to 414.

VII.

Assumed Error in Restricting Mitchell's Closing Argument Was Harmless

Mitchell complains the court prohibited defense counsel from arguing crucial defense evidence.

A. Background

After the incident, Doe told the police Mitchell was at the apartment. At trial, she testified one person in the apartment had a face tattoo. She testified the man said she "should have just been a ho[]." Doe did not identify Mitchell at trial because he was wearing glasses and had a different hair style. She did, however, identify Mitchell's picture. Doe also recognized Mitchell as they were being transported to court; she told a sheriff's deputy " '[t]hat's the guy that did this to me. That's the guy that raped me.' " At the time of trial, Mitchell had a tattoo over his left eyebrow.

The court admitted a 2014 booking photograph depicting Mitchell *without* a face tattoo, authenticated by an affidavit from the sheriff's office. The exhibit also included defense counsel's subpoena for the booking photograph. During closing argument, defense counsel displayed a copy of the exhibit and stated: "This is a photo of Mr. Mitchell from March 14th, 2014. . . . There's his face with no tattoo. That photo is here as a result of a subpoena that I sent to the . . . Sheriff's Office. I asked them pursuant to court order to send me a . . . booking photograph of [Mitchell] from 2014."

The prosecutor objected, and the court sustained the objection. It noted "[t]he document speaks for itself. You can't say that. There's no testimony to that. You just have something on the document." Defense counsel continued, "The . . . photograph is dated . . . 2014. In that photograph you can see that there is no tattoo. [¶] If there is no

tattoo in 2014, then there is no tattoo on his face [on] June 3, 2013." Counsel argued Mitchell was not the man in the apartment with the face tattoo and urged the jury to reject the testimony of Beasley's witness, who identified Mitchell as one of the kidnappers.

In rebuttal, the prosecutor urged the jury to look at the exhibit "and make your own determinations. The problem with it is that . . . Doe [is] not identifying someone off of a face tattoo. It's not I remember the face tattoo forever. . . . She said he looks different because of the hair because I remember dreadlocks and I don't remember glasses. Two things he didn't have when he was seen in custody by . . . Doe. [¶] . . . [¶] So anything in regards to the face tattoo . . . without any questions being asked of her in terms of why there may be a discrepancy is just a red herring and trying to distract you. When you look at the evidence and look at what she said, she knew it was him. She knew it was him and that he changed his looks to make sure that she didn't come in and see him again."

B. No Prejudicial Error in Restricting Defense Counsel's Comments About the "Origin" of the Booking Photograph

Mitchell claims the "court's refusal to allow defense counsel to make a closing argument based on crucial defense evidence, which identified the origin of the booking photograph and established its reliability as a photograph taken after the date of the offense, deeply undermined [his] defense." "A criminal defendant has a well-established constitutional right to have counsel present closing argument to the trier of fact. [Citation.] '[The] right is not unbounded, however; the trial court retains discretion to impose reasonable time limits and to ensure that argument does not stray unduly from the mark.' " (*People v. Benavides* (2005) 35 Cal.4th 69, 110.)

At oral argument, the Attorney General acknowledged that restricting defense counsel from commenting on the origin of the exhibit may have been erroneous, but that any error was harmless. We agree any assumed error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The court admitted the exhibit—which contained the booking photograph, the sheriff's affidavit, and defense counsel's subpoena—into evidence. It allowed defense counsel to make his central point:

that Mitchell did not have a face tattoo in 2013 and, as a result, he was not the person with the face tattoo Doe saw in the apartment. (See *People v. Marshall* (1996) 13 Cal.4th 799, 853–854.) The evidence supporting Mitchell's convictions was strong: Doe testified Mitchell was at the apartment when she was tortured. As Doe and Mitchell were being transported to court for trial, Doe told a sheriff's deputy " '[t]hat's the guy that raped me' " and the deputy confirmed it was Mitchell. Beasley's witness identified Mitchell as one of the armed kidnappers, and Mitchell's palm print was found on an inner layer of duct tape used to bind Doe's blindfold. Precluding defense counsel from describing the methods used to obtain the exhibit was harmless beyond a reasonable doubt.

VIII.

The Prosecutor Did Not Commit Griffin Error

Defendants argue the prosecutor violated *Griffin v. California* (1965) 380 U.S. 609, 612 (*Griffin*), which prohibits the prosecutor from commenting on a defendant's failure to testify.

A. Background

In Booker's closing, counsel argued there was "no current information that he resides in this place. There's no personal items of his recovered, current mail. Anything that you would expect to find if someone is actually living in a place." The prosecutor's rebuttal countered that Booker's defense "completely ignored all the facts," specifically "the belongings in [Booker's] apartment. . . . [W]e're all given subpoena power in court, each lawyer. And each lawyer is able to subpoena witnesses, records, ... If this was not defendant Booker's apartment, you bet your boots someone would be here saying it wasn't." The court overruled Booker's burden shifting objection, and the prosecutor described the evidence connecting Booker to the apartment.

Later, the prosecutor stated Mitchell "didn't come here and tell you he was working with duct tape and that's the reason why his palm print . . . ." Defense counsel objected—and before the court made a ruling—the prosecutor responded, "I'll rephrase that. . . . [¶] You don't have evidence in front of you in regards to another reason why

the palm print got there." After closing argument, Mitchell's attorney asked to clarify that her "objection was to *Griffin* error on [the prosecutor] commenting on Mr. Mitchell's failure to testify." The court responded, "Yes."

B. The Prosecutor Did Not Violate *Griffin*

Booker contends the prosecutor's rebuttal closing violated *Griffin* because he "was the *only* potential witness who could have testified that the apartment in question was not his place [of] residence." There was no "*Griffin* error. ' "*Griffin* forbids either direct or indirect comment upon the failure of the defendant to take the witness stand. The rule, however, does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses." ' " (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1051.) The prosecutor's comment was a permissible observation on Booker's failure to call witnesses to contradict the ample prosecution evidence connecting Booker to the apartment. (*Id.* at p. 1051; *People v. Thomas* (2012) 54 Cal.4th 908, 945 [no *Griffin* error where prosecutor stated " '[n]ot one person came forward' to say defendant 'couldn't have done it, he was with me' "].)

Griffin "does not prohibit the prosecution from emphasizing the defense's failure to call logically anticipated witnesses or the absence of evidence controverting the prosecution's evidence." (*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1051.) Here, the prosecutor's comment cannot reasonably be construed as a remark on Booker's failure to testify because other witnesses could have testified Booker did not live in the apartment, such as a family member, the apartment's leasing manager, or one of the many people in the apartment on the day of the incident.[5] (See *People v. Sanchez* (2014)

[5] The prosecutor's comment did not, as Booker claims, shift "the burden of production to the defense on the critical factual issue of whether Booker resided in the apartment[.]" Additionally, whether Booker lived in the apartment was not a "critical factual issue." The question for the jury was whether Booker was a perpetrator. The answer—overwhelmingly supported by the evidence—was yes. The cases upon which Booker relies are distinguishable. (See *People v. Hill* (1998) 17 Cal.4th 800, 831 [prosecutor told jury, " '*There has to be some evidence on which to base a doubt*' "]; *People v. Woods* (2006) 146 Cal.App.4th 106, 113 [prosecutor asserted "defense counsel had an 'obligation' to present evidence" and that certain evidence did not exist]; *People*

228 Cal.App.4th 1517, 1526 [no *Griffin* error if "other evidence could have been produced to refute the uncontradicted evidence"].)

Booker's reliance on *People v. Northern* (1967) 256 Cal.App.2d 28 is unavailing. There, the defendant was charged with selling narcotics to an undercover police officer. The sales were made in secret; at trial, only the officer testified. (*Id.* at pp. 28–29.) During closing argument, the prosecutor commented the defendant had not refuted or rebutted the People's evidence. (*Id.* at p. 30.) The appellate court held the prosecutor's comments improperly referred to the defendant's failure to testify. (*Id.* at pp. 30–31.) *Northern* is distinguishable. In that case, the defendant was the only person who could have controverted the prosecution evidence. Here and in contrast to *Northern*, Booker was not the only witness who could disavow his connection to the apartment. Second, the prosecutor's comments in *Northern* were directed to the entire prosecution case, and were intended to demonstrate the prosecution had met its burden of proof. Here, the prosecutor's comment concerned a tangential issue, and was a direct response to Booker's claim that there was no evidence connecting him to the apartment.

Mitchell contends the prosecutor's comment about his palm print violated *Griffin*. This claim is forfeited. When the prosecutor made the comment, defense counsel stated, "Objection." Counsel did not object based on *Griffin*. "Because a timely objection and admonition would have cured any harm caused by these remarks, [Mitchell] may not raise the objection for the first time on appeal." (*People v. Mitcham, supra*, 1 Cal.4th at p. 1050 [alleged *Griffin* error forfeited].) Counsel's request to clarify the objection, made after the parties finished closing arguments, does not preserve the argument. The court did not—as Mitchell contends—agree *Griffin* error occurred. The court simply stated "Yes" when defense counsel asked to clarify the basis for her objection. In any event, any conceivable harm from this single sentence in the prosecutor's lengthy closing argument was likely cured when the prosecutor immediately rephrased the comment, and by CALCRIM No. 355, which instructs the jury not to consider the fact that a defendant

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v. Edgar (1917) 34 Cal.App. 459, 469 [prosecutor suggested "if the defendant were not guilty he could and should have" put on certain evidence].)

did not testify, and CALCRIM No. 300, which states neither side is required to call all witness or produce all physical evidence.

Beasley's attempt to establish *Griffin* error is unavailing. The prosecutor's comments were not directed at Beasley, he did not object to the comments directed at Booker and Mitchell, and there is no plausible indication the jury would have understood the prosecutor's comments about Booker or Mitchell to "refer to all defendants' failure to testify."

IX.

No Violation of Section 654

The court sentenced Mitchell to 45 years to life in prison, comprised of consecutive sentences on count 4 (penetration with a foreign object acting in concert), count 7 (human trafficking), and count 3 (torture). Mitchell argues the court erred by failing to stay imposition of sentence on count 7 because that crime shared the same "intent and objective" as the torture and forcible penetration.

Section 654 prohibits multiple punishment for different offenses committed with a single intent or objective. "[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' " (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

"Whether a particular offense is part of a course of conduct for purposes of section 654 is a question of fact. [Citation.] In the absence of an explicit ruling by the trial court . . . [appellate courts] infer that the court made the finding appropriate to the sentence it imposed, i.e., either applying section 654 or not applying it." (*People v. Mejia* (2017) 9 Cal.App.5th 1036, 1045; *People v. Alford* (2010) 180 Cal.App.4th 1463, 1468.) "A trial court's implied finding that a defendant harbored a separate intent and objective

for each offense will be upheld on appeal if . . . supported by substantial evidence." (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

We conclude substantial evidence supports the implied conclusion that defendants harbored separate intents and objectives for counts 3 (torture) and 7 (human trafficking). The prosecution theory was the torture occurred when Booker and another man cut Doe with a machete. Torture requires "the intentional commission of one or more assaultive acts . . . committed with the intent to cause cruel or extreme pain and suffering." (*People v. Mejia*, *supra*, 9 Cal.App.5th at p. 1044.) Here, the evidence supports a conclusion that Booker and the other man tortured Doe for sadistic enjoyment. Mitchell's statement that Doe "should have just been a ho[]" also supports an inference he aided and abetted Booker's intent to take retribution on Doe for refusing to work for Booker previously. The objective in committing the human trafficking was distinct: to force Doe to prostitute herself. (*People v. Halim*, *supra*, 14 Cal.App.5th at p. 643.)

Because the trial court could reasonably discern multiple and independent criminal objectives for counts 3 and 7, section 654 did not preclude imposition of consecutive sentences. (See *People v. Beman* (2019) 32 Cal.App.5th 442, 444 [section 654 did not bar punishment for conspiracy to commit human trafficking and substantive offense of human trafficking in part because "defendant's conspiracy to commit human trafficking had broader objectives" than the substantive offense]; *People v. Mejia, supra*, 9 Cal.App.5th at pp. 1046, 1047 [criminal threats were not necessary to, nor "committed in furtherance of the crime of torture"].)

Mitchell claims human trafficking (count 7) and penetration by a foreign object acting in concert (count 4) shared the same intent and objective: "to aid and abet Booker in engaging Doe in prostitution." We disagree. Booker put his gun in Doe's vagina and threated to kill her if she screamed, suggesting his objective in committing this offense was to dissuade Doe from calling for help or reporting the incident, or to achieve sexual gratification. The trial court could reasonably discern different criminal objectives for the human trafficking and the foreign penetration, a gratuitous act of violence separate from the human trafficking. (*People v. Pearson* (2012) 53 Cal.4th 306, 333 [no violation

of section 654 because "two separate, individually punishable criminal acts were committed"]; *People v. Assad* (2010) 189 Cal.App.4th 187, 201 [no error in imposing separate punishment on inflicting corporal injury and torture]; *People v. Perez* (1979) 23 Cal.3d 545, 552 [cautioning against defining a criminal objective so broadly as to encompass a string of separate crimes]; *People v. Saffle* (1992) 4 Cal.App.4th 434, 448 [sentencing for sodomy, digital penetration, and false imprisonment arising out of attack on same victim did not violate section 654].)

X.

No Remand for Section 12022.5, Subdivision (c)

In a supplemental brief, Booker argues his case should be remanded to give the trial court the opportunity to consider striking the section 12022.5 firearm enhancement attached to count 3 (torture). We disagree.

A. Background

At the December 2016 sentencing hearing, the court sentenced Booker to 55 years to life in state prison. The court noted several factors in aggravation and none in mitigation. It determined the crime involved "great violence and bodily injury, a high degree of cruelty, viciousness, callousness . . . , and assault. The . . . jury found [Booker] was armed and used a weapon at the time of commission." The court found Booker induced others to participate, carried out the crimes with "planning, sophistication, [and] professionalism," and that Booker had prior convictions, including a murder conviction. It noted Booker "was on formal probation with community release at the time he committed this offense. And he committed this offense prior to the homicide that he was [also] convicted of prior to this case. So there doesn't appear to be any circumstances of mitigation."[6]

[6] Booker had juvenile adjudications for burglary and receiving stolen property, and several probation violations. As an adult, Booker had been convicted of possessing controlled substances, carjacking, felon in possession of a firearm, and murder with a personal gun use enhancement. The court determined Booker's sentence for the crimes pertaining to Jane Doe would run consecutively to the term of imprisonment imposed for the murder conviction in the other case.

The sentence included a consecutive 10-year firearm enhancement (§ 12022.5, subd. (a)) on the torture conviction (count 3). The court stated section 12022.5, subdivision (a) "carries three, four, and ten [additional and consecutive years]. . . . I see it as an aggravating clause. . . . [A]n aggravating term, the nature and extent of what happened. Everybody saw those pictures. . . . [W]e saw this in realtime with the [police officer's body camera] going. You see her bleeding, and you see her sliced up in her breasts, her stomach . . . . All of these things make that an aggravating circumstance." The court also imposed and stayed a four-year firearm enhancement (§ 12022.5, subd. (a)) on the assault with a firearm conviction (count 2).

B. Remand Is Not Required

When Booker was sentenced in 2016, section 12022.5, subdivision (a) imposed a mandatory additional and consecutive prison term of 3, 4, or 10 years for personally using a firearm in the commission of a felony. A trial court now has discretion to strike or dismiss a firearm enhancement in the interest of justice. (§ 12022.5, subd. (c).) The amendment applies retroactively to cases not yet final on appeal. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1109.) Remand to allow the trial court to consider whether to strike a section 12022.5 enhancement "is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so." (*Almanza*, at p. 1110.) The Attorney General argues against a remand, claiming the sentence and the court's comments at sentencing show the court would not have stricken the firearm enhancement. We agree.

People v. McVey (2018) 24 Cal.App.5th 405 (*McVey*) is instructive. There, the defendant shot an unarmed homeless man several times and the court imposed the aggravated 10-year term on the section 12022.5 firearm enhancement. (*McVey*, at p. 419.) The defendant appealed, arguing the case should be remanded to allow the court to consider whether to strike the enhancement. (*Id.* at p. 418.) The appellate court disagreed. It noted the trial court had "discretion to impose a 3-, 4-, or 10-year prison term for the firearm enhancement in count 1. In choosing the 10-year enhancement, the trial court identified several aggravating factors, including the lack of significant

provocation, appellant's disposition for violence, his lack of any remorse, and his 'callous reaction' after shooting an unarmed homeless man six or seven times. These factors, the court said, far outweighed any mitigating factors." (*Id.* at p. 419.)

McVey also noted the trial court had observed "appellant 'did not hesitate to shoot this unarmed homeless guy' multiple times, and described appellant's attitude as 'pretty haunting.' Thus, when it imposed the sentence enhancement under . . . section 12022.5, subdivision (a), the court declared, '[T]his is as aggravated as personal use of a firearm gets,' and 'the high term of 10 years on the enhancement is the only appropriate sentence on the enhancement.' " (*McVey, supra,* 24 Cal.App.5th at p. 419.) "In light of the trial court's express consideration of the factors in aggravation and mitigation, its pointed comments on the record, and its deliberate choice of the highest possible term for the firearm enhancement, there appears no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether. We therefore conclude that remand in these circumstances would serve no purpose but to squander scarce judicial resources." (*Ibid.*)

As in *McVey*, the record contains a clear indication the court would not have stricken the firearm enhancement had it possessed the discretion to do so. Like *McVey*, the court found several aggravating factors, and no mitigating factors. Booker—who had a lengthy criminal history—was on probation when he committed the crimes against Doe, crimes which illustrated an uncommon level of viciousness and cruelty. As in *McVey*, the court imposed the aggravated term on the firearm enhancement, and when imposing that term, the court made comments justifying its decision. While the court's comments were not as pointed as in *McVey*, they carry the same import. Under the circumstances, no reasonable jurist would have found it was in the interest of justice to strike the firearm enhancement.

We conclude a remand for the court to consider whether to strike the section 12022.5 enhancement would be a useless act. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896; *McVey, supra,* 24 Cal.App.5th at p. 419; see also *People v. Jones* (2019) 32 Cal.App.5th 267, 274 ["trial court would not have dismissed defendant's

prior serious felony even if it had discretion to do so"].) Booker's perfunctory supplemental brief—devoid of an analysis of the sentence imposed or the court's comments at sentencing—does not persuade us a remand is required.

XI.

Limited Remand to Determine Beasley's Custody and Conduct Credits

Beasley argues there is a discrepancy in the amount of custody credits awarded by the court. He also contends the court erred by failing to award him conduct credits pursuant to section 2933.1. The Attorney General agrees Beasley is entitled to additional credits and suggests a remand to allow the court to recalculate those credits. We accept the Attorney General's suggestion and remand to the trial court for a recalculation of Beasley's custody and conduct credits.

DISPOSITION

Booker and Mitchell's respective judgments are affirmed.

Beasley's case is remanded to the trial court with directions to recalculate his credits in accordance with this opinion, and to prepare an amended abstract of judgment and forward a certified copy to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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Jones, P.J.

WE CONCUR:

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Needham, J.

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Burns, J.

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